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Supreme Court, U.S.
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No. 00-972

IN THE

Supreme Court of the United States

CONTEMPORARY MEDIA, INC, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Petitioners respectfully submit their reply to the Brief in Opposition of the Federal Communications Commission ("FCC") and the Department of Justice (collectively "the Government").

I. The Excessive Fines Issue Is Not Insulated from Review by any "Separate and Independent Ground" for the FCC's Action

The Government argues that Supreme Court review of the excessive fines issue is "not warranted" because the FCC allegedly based its revocation sanction on two "separate and independent grounds": 1) Mr. Rice's state criminal conviction and 2) false statements made to the FCC regarding Mr. Rice's role at his radio stations subsequent to the filing of the state charges. Op. Brief at 6-7. The plain language of the FCC's decision does not support the Government's claim.

In its decision, the FCC did state that "we find that Rice's felony convictions and the Licensees' misrepresentation and lack of candor with respect to Rice's role at the radio stations subsequent to his arrest constitute separate and independent grounds for disqualification of the Licensees."[1] The FCC immediately went on to state, however: "Moreover, *the totality of the evidence in this proceeding* of Rice's criminal acts and the Licensees' deceit *convinces us that the Licensees lack the requisite character qualifications* to deal truthfully with the Commission and to comply with our rules and polices."[2] The FCC thus stated that its ultimate

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[1] *Contemporary Media, Inc.*, 13 F.C.C. Rcd. 14437, 14459 (1998) (¶41) (Pet. App. B at 59a) ("*FCC Decision*"), *recon. denied*, 14 F.C.C. Rcd. 8790 (1999), *aff'd Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (D.C. Cir. 2000).

[2] *FCC Decision*, 13 F.C.C. Rcd. at 14459 (¶41) (Pet. App. B at 60a) (emphasis supplied).

conclusion regarding the licensees' "character qualifications" was a "gestalt" judgment based on the "totality of the evidence" in the case.

Were there any remaining doubt on this point, the FCC dispelled it two paragraphs later. After rejecting in summary fashion Petitioners' Eighth Amendment excessive fines argument, the FCC returned to the subject of the proper penalty to impose. The FCC stated:

> As previously explained, we believe the misconduct in this case was extremely serious, involving egregious criminal acts by the Licensees' sole owner and repeated misrepresentations by the Licensees designed to minimize the effect of Rice's criminal record on their qualifications. *Cumulatively, the evidence of misconduct warrants a conclusion that the Licensees lack the requisite character traits of truthfulness and reliability to retain their authorizations. . . . We conclude that revocation is appropriate in the circumstances of this case.*[3]

The FCC thus based its ultimate decision to revoke all of Mr. Rice's radio licenses and permits not on two "separate and independent grounds," but rather on "the totality of the evidence" and the "cumulative" weight of the evidence on *both* the criminal misconduct and the false statement issues. This is proved not by "one word" in the decision, as the government

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[3] *Id.* at 14460 (¶ 43) (Pet. App. B at 61a-62a) (emphasis supplied).

would have it (Op. Brief at 7), but by *the entirety of what the FCC said about the matter.*[4]

It is well settled that federal administrative actions are reviewed on appeal based on the reasons given by the agency itself in explaining the decision it reached. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). The *post hoc* rationalizations and improvisations of appellate counsel cannot supply a missing basis, or modify a stated basis, for agency action. *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Where an agency relies on multiple grounds, one of which is infirm, its decision cannot be upheld unless it is *clear* from the agency's decision that the agency would have reached the same result in the absence of any consideration of the invalid ground. *E.g., Syracuse Peace Council v. FCC,* 867 F.2d 654, 657 (D.C. Cir. 1989), *cert.*

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[4] The Government also claims that a former counsel for Petitioners "conceded" during oral argument before the Court of Appeals that "the FCC decision rested on separate and independent grounds." Op. Brief at 6-7. The statement in the D.C. Circuit's opinion on which the Government relies (Pet. App. A at 14a) does not support the Government's claim. While former counsel may have "conceded" that intentional misrepresentation can constitute, in an appropriate case, an adequate legal basis for license revocation (which it can), nothing in the D.C. Circuit's opinion indicates that any "concession" was made regarding whether the *FCC's decision* "rested on separate and independent grounds." Petitioners note that a transcript of the oral argument before the Court of Appeals: 1) is not in their possession; 2) is not in the record; 3) has not been supplied by the Government; and 4) has not been quoted by the Government. Moreover, even assuming that former counsel did "concede" something about the basis of the FCC's decision which the decision itself shows is not true, such a "concession" would scarcely require the Supreme Court to ignore what the FCC itself said in its decision. Adjudication is not a game; it is a solemn search for justice. The Government forgets this. The Court must not do so.

denied, 493 U.S. 1019 (1990). No such conclusion is possible in this case.

If the FCC's decision makes anything plain, it is that the agency was powerfully – indeed, decisively – influenced by what the FCC termed Mr. Rice's "egregious" sexual misconduct. It is by no means "clear" from the FCC's decision that the agency would have revoked all of Mr. Rice's radio licenses and permits in the absence of that so-called "egregious" misconduct. The strong likelihood, in fact, is that it would not have done so.[5]

As the Government appears to concede (Op. Brief at 8), the FCC's revocation sanction cannot be sustained if it constitutes, in whole or in part, a punitive sanction, for in that event it would be subject to Eighth Amendment scrutiny, and a hearing would thus be required to determine whether the FCC's massive, multi-million dollar revocation penalty is grossly disproportionate to the misconduct of Michael Rice. Supreme Court consideration of whether the Eighth

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[5] The "misrepresentation/lack of candor" evidence before the agency was far from compelling. The alleged false statements 1) were not authored, approved or submitted by Mr. Rice himself; 2) were drafted, signed and submitted by Washington legal counsel for the licensees; and 3) were couched in what proved to be, in hindsight, unfortunately vague and ambiguous language. Under such circumstances, any inference of the required intent on the part of Mr. Rice to deceive the FCC is, at best, difficult to draw. Other mitigating circumstances, too numerous to detail here, make the case for total revocation based on the misrepresentation issue alone extremely weak. That is doubtless one reason why the FCC expressly relied in its decision on "the totality" of the evidence on both issues in reaching its ultimate revocation decision. All of these matters properly will be subject to FCC evaluation in the context of an appropriate Eighth Amendment hearing to determine whether the FCC's ultimate revocation penalty was grossly disproportionate to the misconduct of Michael Rice.

Amendment applies to the FCC's revocation sanction is therefore warranted, because the FCC's draconian revocation penalty could well be altered and reduced as a result of proper Eighth Amendment scrutiny.

II. The FCC's Revocation Sanction Was Not "Solely Remedial"

The Government admits that government sanctions which are punitive, even in part, are fully subject to the Eighth Amendment's prohibition of excessive fines. Op. Brief at 8, citing *Austin v. United States,* 509 U.S. 602, 610 (1993) ("*Austin*"); *accord United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998) ("*Bajakajian*"). The Government claims, however, that the FCC's decision to revoke all of Michael Rice's radio licenses and permits based on his unrelated state conviction for sexual offenses was not in any respect punitive, but rather "served only remedial purposes." Op. Brief at 8. How revoking seven federal radio station licenses and permits based on state law sex offenses that had nothing to do with the radio stations could be thought a "remedial" action is at best obscure, and the Government's effort to explain its position is neither clear nor convincing.

According to the Government, Mr. Rice's conviction for unrelated sex offenses demonstrated that his "character" was not that of one "qualified" to own and operate a radio station "in the public interest." The problem to be "remedied," according to the Government, was that someone not "qualified" to own a radio station nevertheless owned one. In such a case, the Government "reasons," the "obvious remedy" is "to revoke the license." Op. Brief at 8. The Government claims, in other words, that the FCC did not "punish" Michael Rice for his unrelated sex crimes; it merely subjected him to a "remedy" because he had the "bad character" to commit them.

This "reasoning" produces interesting results when applied in other contexts: A felon, for example, is not incarcerated as "punishment" for his crime, but rather "solely as a remedy" because his crime proves his "character" to be that of one "unqualified" to remain unconfined. Similarly, a drug offender is not deprived of federal benefits under 21 U.S.C. §862 as a "punishment," but rather "solely as a remedy" because his offense proves him "unqualified" to receive such benefits. And in a case lately heard by the Supreme Court, Mr. Hosep Bajakajian was not ordered to forfeit $357,144 in cash as a "penalty" for not declaring the cash to Customs, but rather "solely as a remedy," because 18 U.S.C. §982(a)(1) provides that those who fail to report their cash to Customs lack the "qualifications" that would entitle them to keep it. Since Mr. Bajakajian was not "qualified" to retain his money, the "obvious remedy" – by the Government's "reasoning" – was to take it away from him.[6]

The Government's conception of the "remedial" departs from common understanding and the decisions of the Supreme Court. A "remedial" action is one designed "'to obtain compensation or indemnity;'"[7] one which seeks to "compensate the Government for the expense of law enforcement activity and . . . societal problems;" one which

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[6] To escape these and similar absurd consequences, the Government's argument would have to posit that radio station licenses and permits are distinct from other types of property. Such a theory might hold, for example, that a radio station owner is a sort of secular, FCC-anointed "priest" who must remain worthy of his sanctified status or suffer the loss of his broadcast "parish." Since the Government espouses no such theory in its opposition brief, there is no need to debate its dubious validity here.

[7] *Bajakajian,* 524 U.S. at 329, quoting BLACK'S LAW DICTIONARY 1293 (6th ed. 1990); *see also* BLACK'S LAW DICTIONARY 1279 & 1293 (6th ed. 1990) ("remedial" means "giving means of obtaining redress"; "redress" means "[s]atisfaction for an injury or damages sustained").

imposes "liquidated damages;" or one which "removes dangerous or illegal items from society."[8] The FCC's revocation penalty in this case does not further, and was not designed to further, any of these remedial ends. It is entirely punitive in nature.

The Supreme Court has made plain that actions designed to exact retribution or to deter misconduct are punitive, not remedial. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand that term." *Austin,* 509 U.S. at 610, *quoting United States v. Halper,* 490 U.S. 435, 448 (1989); *see also id.* at 620-21; *accord Bajakajian,* 524 U.S. at 329 ("[d]eterrence, however, has traditionally been viewed as a goal of punishment"). While one might reasonably debate whether the FCC acted in part for retributive reasons in imposing its massive license revocation sanction on Michael Rice, one cannot reasonably deny that it acted to deter misconduct. This is so because the FCC itself has repeatedly said that this is so. In its *Character Policy Statement,* for example, the FCC said:

> [D]eterrence is an important element of the character qualifications process, as it helps to ensure future reliability and truthfulness. The role of deterrence in the licensing process has long been recognized. . . . Sanctions imposed

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[8] *Austin,* 509 U.S. at 620-21, *citing, inter alia, United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 364 (1984), *and One Lot Emerald Cut Stones v. United States,* 409 U.S. 232, 237 (1972); *see also Bajakajian,* 524 U.S. at 329 (remedial action "compensates the government for lost revenues").

> may deter future misconduct of the applicant in question and of others observing our actions.[9]

The Supreme Court has held that sanctions intended to deter misconduct are punitive. The FCC has held that license revocation is intended to deter misconduct. License revocation is therefore a punitive sanction. The Government's contrary claim is without merit.

The Government also claims that the "historical understanding" is that license revocation is "not punitive." Op. Brief at 9, citing *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946) ("*WOKO*"). Not so. The FCC has "historically" – and repeatedly – said that the central purpose of license revocation is deterrence, a goal the Supreme Court has found to be punitive. Indeed, the FCC has also "historically" – and repeatedly – referred to license revocation not as a "remedy," but as a *penalty* for misconduct.[10] The Supreme Court also

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[9] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1228, *on recon.*, 1 F.C.C. Rcd. 421 (1986); *see, e.g., Broadcast Hoaxes*, 7 F.C.C. Rcd. 4106, 4107 (1992) (discussing the "deterrence value" of fines, license revocation and other sanctions for licensee misconduct); *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C. Rcd. 3252, 3254 n. 4 (1990) (discussing the "deterrent impact" of loss of license); *United Broadcasting Co.*, 100 F.C.C.2d 1574, 1585 (1985) (¶24) (discussing the deterrent effect of loss of license); *Faulkner Radio, Inc.*, 88 F.C.C.2d 612, 615-16 (1981) (same); *see also Richard Richards*, 10 F.C.C. Rcd. 3950, 3955 (Rev. Bd. 1995) (collecting cases).

[10] *E.g., Broadcast Hoaxes*, 7 F.C.C. Rcd. at 4107 (admonitions, fines, non-renewal of license and license revocation are available "penalties" for broadcast hoaxes); *Overall Renewal/Revocation Approach to Implementation of 47 U.S.C. §312(a)(7)*, 93 F.C.C.2d 423, 432 (1983) (license revocation is a "sanction" and a "penalty" under Section 312(a) of the Communications Act); *Theodore E. Sousa*, 92 F.C.C.2d 173, 179 (1982) (Section 312(a)(2) provides for "revocation penalty").

has referred to license revocation as a "penalty." *CBS, Inc. v. FCC*, 453 U.S. 367, 378 (1981).[11]

The Government's claim that the FCC's revocation sanction was "solely remedial" is thus factually and legally false.

III. The Government's Subsidiary Claim that License Revocation May Not Be a "Payment" Lacks Merit

The Government claims in a footnote that it is "difficult" to see how license revocation could be considered a "payment" to the government, because past decisions of the Supreme Court have noted that, under Section 301 of the

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[11] The Government claims the Supreme Court's *WOKO* decision is to the contrary, but it is not. As Petitioners have already pointed out (Pet. at 16), the *WOKO* decision said that denial of a license renewal application due to "the insufficiency or deliberate falsity of the information lawfully required to be furnished" is not a "penal measure." 329 U.S. at 228. This case involves, by contrast, the revocation of existing licenses and permits due to sexual misconduct that had *no relationship whatsoever to the radio stations*. The Government professes to see "no pertinent distinction" (Op. Brief at 9 n.5), but its reason why is as cloudy as its eye for spotting "pertinent distinctions" appears to be. The Government seems to claim that Petitioners must allege the *statutory* invalidity of the FCC's action in order to challenge the action's constitutionality. That is not so. Although Petitioners have not made the "reasonableness" of the FCC's action the centerpiece of a separate legal challenge; they *have* challenged the action's constitutionality under the Eighth Amendment. An action that is unconstitutional would seem to encompass, as a "lesser included offense," the flaw of "unreasonableness." And to the extent the Government argues that an FCC action which violates the Constitution may still serve "the public interest," the argument self-evidently lacks merit. This would be so even if FCC Chairman Powell had not recently displayed the great candor and good sense to state that the "public interest" standard suffers from a severe case of vagueness. E.g., The Washington Post, Feb. 7, 2001, §E at 1; N.Y. Times, Feb. 7, 2001, §C at 1, col. 2.

Communications Act, licensees do not "own" their radio frequencies or hold any "right beyond the terms . . . of the license." 47 U.S.C. §301; see Op. Brief at 8 n.3, citing *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 394 (1969), and *FCC v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940). The fact that no vested right of ownership of the radio spectrum is permitted under the Communications Act scarcely means that an authorization to use that spectrum for a term of years is not a valuable property interest the revocation of which can constitute a "payment in kind" under the Eighth Amendment. As Petitioners pointed out in their petition (at 14-15 n.29), radio licenses and permits are routinely sold by their holders *and also by the government* for tens and even hundreds of millions of dollars. Given this, it is understandable that the Government has restricted its argument on this point to a claim of puzzlement and relegated it to a footnote.

IV. Conclusion

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted

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